IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 381

MURIEL F. McCARTY,

Plaintiff-Petitioner,

vs.

R. R. NELSON, Administrator of the Estate of Albie C. Sansbury, and MARGUERIETTE H. DeKARLO,

Defendants-Respondents.

RAY FRANKLIN BUSHAW,

Plaintiff-Petitioner,

vs.

R. R. NELSON, Administrator of the Estate of Albie C. Sansbury, and MARGUERIETTE H. DeKARLO,

Defendants-Respondents.

MARVEL SANSBURY, by MURIEL F. McCARTY, Guardian Ad Litem,

Plaintiff-Petitioner,

vs.

R. R. NELSON, Administrator of the Estate of Albie C. Sansbury, and MARGUERIETTE H. DeKARLO,

Defendants-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

AND BRIEF IN SUPPORT THEREOF

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Northwest Brief Printing Co., 323 S. Fourth St., Minneapolis 15

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now Muriel F. McCarty, Ray Franklin Bushaw and Marvel Sansbury, by Muriel F. McCarty, guardian ad litem, the above named petitioners, and respectfully petition this Honorable Court to grant Writ of Certiorari to review

the decision and judgment of the Supreme Court of Minnesota, the highest court in said State, rendered and entered finally May 17, 1951, in the cases lately pending in said Supreme Court of Minnesota styled:

Muriel F. McCarty, Plaintiff-Respondent, vs. R. R. Nelson, Administrator of the Estate of Albie C. Sansbury, and Margueriette H. DeKarlo, Defendants-Appellants;

Ray Franklin Bushaw, Plaintiff-Respondent, vs. R. R. Nelson, Administrator of the Estate of Albie C. Sansbury, and Margueriette H. DeKarlo, Defendants-Appellants;

Marvel Sansbury by Muriel F. McCarty, Guardian ad Litem, vs. R. R. Nelson, Administrator of the Estate of Albie C. Sansbury, and Margueriette H. DeKarlo, Defendants-Appellants;

although three separate judgments were entered in the trial court one notice of appeal was allowed which was numbered 35287 of causes on the docket of said Supreme Court of Minnesota reversing the decrees in favor of each of the petitioners in the trial court, District Court of Hennepin County, Minnesota, by the rendition of one opinion, which opinion was originally made and filed March 16, 1951, but thereafter a petition for re-argument and re-hearing was duly made, filed by respondents therein and petitioners herein, the principle question in said petition being that the decision of March 16, 1951, infringed upon petitioners' rights guaranteed them under the due process of law and equal protection of the law clause of the Fourteenth Amendment of the Constitution of the United States. The highest state court of Minnesota, the Supreme Court of said State, denied said petition without opinion May 17, 1951, making said decision final on said date.

The aforesaid Decision is recorded in 47 N. W. (2d) 595, 233 Minn. .....

NATURE OF CASES AND SUMMARY STATEMENT OF THE MATTER INVOLVED

Each of the petitioners instituted an action in the Hennepin County District Court, State of Minnesota, for the specific performance of an oral agreement entered into on or about the time that their mother, Alice Hierlmier, married Albie C. Sansbury on October 20th, 1907, at Minneapolis, Minnesota, whereby Albie C. Sansbury on one side, agreed with Alice Hierlmier and the petitioners on the other side, to take and make the petitioners his children and to become their father, and thereupon petitioners became members of the household of Albie C. Sansbury and were considered by him as his children, which relationship continued until the petitioners married or reached their majority and the relationship of parent and child by speech and conduct continued until the death of Albie C. Sansbury. Each of the petitioners' complaints are similar and a few paragraphs of the complaint of petitioner Muriel F. McCarty allege the following:

> "IV. That immediately after the marrriage of Albie C. Sansbuy to their mother on August 20, 1907, the plaintiff and her aforesaid brother and her aforesaid sister and said Albie C. Sansbury and his wife, Alice Ames Sansbury, contracted orally by and between each other in fact and substance as follows:
>
> "That if plaintiff and her said brother and her said sister would live in the house and home of Albie C. Sansbury and his said wife and live with them and give them their services as they should be directed until they had become of age or married, that in consideration thereof, at their death said Albie C. Sansbury and his said wife would give and leave to the plaintiff and to each of her said sister and her said brother a full child's proportionate share as if they had been born unto them, of all the property, both real and personal, which they own and which they might own at the time of their death.
>
> "V. That, relying upon the aforesaid promise and

agreement and pursuant to said contract as aforesaid, the plaintiff lived at the house and home of, and with Albie C. Sansbury and his wife, Alice Ames Sansbury, and gave them her services as requested daily and continually until she was married October 15, 1911.

"VI. That the services so rendered by the plaintiff as aforesaid cannot be enumerated specifically but said services consisted of housework of every kind and character, all work in and about the house of every nature required in housekeeping and in running and maintaining a home, of serving, washing, ironing, and much other and different kinds of work done and performed outside of the dwelling house has been done in many different ways as requested by said Albie C. Sansbury and his said wife. That said services included the caring for and nursing of said Albie C. Sansbury and his said wife when ill.

"VII. That during said time as aforesaid, a strong affection existed between said Albie C. Sansbury and his said wife and the plaintiff and her said sister and said brother, and the labor and services as aforesaid and the relationship herein described were daily and continuous until the plaintiff was married as hereinbefore alleged. That the aforesaid affection continued to exist until the demise of Albie C. Sansbury, April 28, 1948.

"VIIa. That plaintiff under and pursuant to aforesaid agreement assumed a peculiar and domestic relation to decedent Albie C. Sansbury as a member of his family; and conducted herself towards him as a dutiful daughter and obeyed and faithfully served decedent Albie C. Sansbury and there followed and persisted an intimate companionship and personal care and attention and affection that cannot be measured in money. That decedent, Albie C. Sansbury, bargained for and received the benefit of plaintiff's companionship and affection, as well as her energies and attention of her services under and pursuant to the aforesaid agreement. That plaintiff never received any consideration or wages for services rendered, or any part thereof, in aforesaid relationship. That decedent Albie C. Sansbury apparently in good health, was suddenly stricken while working in

his garden acres. That said decedent Albie C. Sansbury did not perform the aforesaid agreement on his part to be performed and failed and neglected to convey, assign, and devise a child's portion of his property to the plaintiff, as he had agreed to do. That plaintiff in justice is entitled to have, receive, and to be decreed to her an undivided one-quarter of decedent Albie C. Sansbury's estate that he died possessed of." (R. pp. 2 and 3.)

A jury was called to sit in the case to determine one question only, whether or not the oral contract, alleged to have been made by the parties, was made.

At the close of the testimony, the trial court as part of his charge to the jury instructed said jury as follows:

"It is admitted that there was no will left by Mr. Sansbury before he died.

"Now, it is the claim of each plaintiff that their mother, Alice Ames Sansbury, was a widow in 1907, living in St. Paul, Minnesota. That at that time or just before that time, there were two men interested in her as a prospective wife, a William Hart and Mr. Sansbury. That she was living with her three children at that time. That each of these two men courted her at the place where she lived with the children, and each plaintiff claims that she was interested in the welfare of the children, in addition to her own welfare as to marriage; and that on the marriage with Mr. Sansbury there was an agreement made between Mr. Sansbury on the one part and the mother and her three children on the other part that on their marriage the children should be given the same rights as if they were natural children of Mr. Sansbury.

"And the claim is that on August 20th, in the Garfield Hotel, in this city, the contract was definitely stated; and that thereafter the claim is by each plaintiff that the three children lived with Mr. Sansbury and Mrs. Sansbury as their natural father and mother, and they claim that because of the relationship so instituted at that time through this agreement, there was a state of affection and confidence between the step-father and the children and the mother and the children which cannot

be compensated in money. And they claim that they are entitled to, under the agreement of the father, a share of the estate which they would have if they had been his natural children with Mrs. Sansbury.

"In each case the defendant denies that there was any agreement; denies that there was any performance of that agreement, if there was one. And the defendant Margueriette DeKarlo claims that she not only is the adopted daughter of Albie C. Sansbury and his wife, Alice Ames Sansbury, but that she is the real daughter of her adopted father. In other words, that her father was unfaithful to his wife and that she was the innocent result of that unfaithfulness. This took place apparently about the time that Mrs. Sansbury's son, Ray, had left the family because of his marriage.

"And the defendant, Margueriette DeKarlo, claims that she is entitled to the whole estate, irrespective of the claim of each plaintiff that their mother, in their presence, made an agreement with her father, long before she was born, that they should be his natural children.

"I instruct you that an adopted child in this State, in so far as the estate of a parent is concerned, is no better than the claim of a natural child of that parent, and it is no worse. Whether the defendant, Margueriette DeKarlo, is the natural child of Mr. Sansbury does not add to the rights that she would have to his estate because admittedly she is the adopted daughter of him and his wife.

"The burden of proof in this case is upon each plaintiff to prove by a preponderance of the evidence the claim he makes as to the making of this agreement. And that is the only question that will be submitted to you: Was there such an agreement made? I will speak of that later. By preponderance of evidence, I mean the greater weight of the evidence.

"I charge you that a person in this State may obligate himself to make his or her will in a particular way, or to give certain or specific property, or all his or her property to a particular person or persons so as to bind his estate. But Courts are strict in looking into the nature and circumstances of such contracts and

require satisfactory evidence of their fairness and justice. Of course, if the consideration for the contract is merely labor and services which may be estimated and their value liquidated in money so as to make the promisee hold, then specific performance would not be performed or enforced. But if the consideration for the contract is that the promisee—the children and the wife—which assume a peculiar and domestic relationship to the promissor and render him services of such a peculiar character because of the friendly relationship that it is practically impossible to estimate the value by any pecuniary standard, then specific performance may be enforced.

"Under the statutes of this Sate, as you have been told by counsel, a witness in a suit who may be interested in the result of a lawsuit or a party to the suit may not testify if objection is properly made to things that were said by a deceased person. Hence, in this case, on objection, there was no testimony from Muriel or Ray as to what the agreement was between the father and mother as to their status.

"The plaintiff claims there is sufficient testimony from other sources as to that, and the defendant claims there is not. I am submitting to you just one question in each case, and the question is this: Was there an agreement made on or about August 20th, 1907, between Albie C. Sansbury, on one side, and his wife, Alice Ames Sansbury, and her child, Muriel Bushaw, the plaintiff herein, on the other side, that thereafter the relationship of natural father and child should exist between Albie C. Sansbury and the child, Muriel Bushaw? There will be an answer of yes or no to that question.

"The same question is in each case, except, of course, the name of the promisee, the child, is different in each verdict.

"You will take up the questions of fact in this case as judges of the facts, and you will exercise your own judgment, your reasoning power, your common sense, as men and women of good judgment and common sense. You are to go by the evidence presented here before you, and by that only" (R. pp. 30 to 33).

The trial court made findings and conclusions and a memorandum made part of the decision, and order for judgment for each petitioner, the plaintiffs in said actions, and all are similar, and some paragraphs of the findings of fact and conclusions of law including memorandum made part of the decision, in behalf of petitioner, Muriel F. McCarty, are as follows:

"IV. That Mrs. Leah H. Rempher, who was a witness in these proceedings, is the maternal aunt of the plaintiff, and during the early part of the century lived at Grand Forks, North Dakota, with her family; that she frequently visited her mother at the family home in Medford, Wisconsin, when she also visited her sister, Alice, the mother of plaintiff. That in 1906, when she visited her sister, Alice, and her daughter, the plaintiff, and her son, Ray, and her daughter, Marvel, Alice and her said three children were living at 1672 West Seventh Street, St. Paul, Minnesota, where and when she met and became acquainted with one William Hart, who had proposed marriage to her sister, Alice, and had offered to agree in substance if she married him to make her daughter, the plaintiff, and her two other children, members of his family, consider and treat them as his own and be a natural father to them. That also on this same visit to her sister, Alice, Mrs. Leah H. Rempher met and became acquainted with one Albie C. Sansbury, a soldier in the United States Army, stationed at Fort Snelling, Minnesota, who was also very friendly to Alice; that her sister, Alice, further informed her in substance that if Albie C. Sansbury would agree to take and make her daughter, the plaintiff, and her two other children, members of his family, consider and treat them as his own children and be and become a natural parent to them, she would marry Albie C. Sansbury in preference to marrying William Hart. Mrs. Leah H. Rempher visited her sister, Alice, the following year when she was with her daughter, the plaintiff, and her two other children, living in and running the Garfield Hotel in Minneapolis, Minnesota. During this visit, and on August 20th, 1907, her sister, Alice, and Albie C. Sans-

bury were married. That on this occasion Mrs. Rempher was present and heard Albie C. Sansbury orally agree with her sister, Alice, and with and in behalf of the plaintiff and her sister and brother, in substance that Albie C. Sansbury did take and accept the plaintiff as a member of his family and that the relationship of natural parent and child would exist between them and that Albie C. Sansbury would consider, treat and do for plaintiff what a natural parent would do for his own child. That Mrs. Rempher thereafter visited several times with her sister, Alice Ames Sansbury, and Albie C. Sansbury, and the plaintiff and her brother and sister were living together as a happy and contented family and a happy, congenial and helpful family relationship existed between Albie C. Sansbury and the plaintiff and plaintiff's sister and brother.

"That in fact in arranging for and consummating this marriage with the plaintiff's mother, the said Albie C. Sansbury as a part consideration for said marriage agreed to take Alice's three children as his own children and treat them as their natural father; that the said Alice's three children would be his heirs at law; that from the time of the marriage the relationship of father and child would exist between him and each of said Alice's three children, including the plaintiff herein.

* * * * *

"VI. That plaintiff in pursuance of and in reliance upon the aforesaid agreement, understanding and oral contract, assumed her place as a child of the deceased said Albie C. Sansbury and rendered him services customarily rendered by a child to a parent. Plaintiff went to school, was reared and treated by Albie C. Sansbury as his child, and, in turn, treated him as her parent, and gave him the services, obedience and affection of a child. Plaintiff was treated in all respects as a member of the family of Albie C. Sansbury, and was a loyal, obedient and affectionate child to Albie C. Sansbury, yielding to him the respect, obedience and affection due from a child to a parent, and he returned the affection of a parent to his child, the plaintiff. The relation between Albie C. Sansbury and the plaintiff was at no time disagreeable,

disobedient or lacking in respect and affection. That plaintiff addressed Albie C. Sansbury as "Dad" and "Pa," and in turn was addressed as his child. That a number of persons, who were witnesses in this action, testified that they were neighbors of Albie C. Sansbury over a period of time and frequently visited the home of Albie C. Sansbury and that from their association with the family and their observance of the manner, speech and consideration of and towards each other, by Albie C. Sansbury and the plaintiff, their relationship was congenial and affectionate, plaintiff calling Albie C. Sansbury "Pa" and "Dad," who, in turn, addressed plaintiff as his child. That plaintiff, aside from performing work and services at home, also worked away from home and at several places and that the earnings and wages received were surrendered to Albie C. Sansbury after each payday. That plaintiff never received any compensation whatever for labor and services rendered Albie C. Sansbury, deceased, which labor and services were of the kind and nature that cannot be computed or calculated in money, and no evidence was offered from which any calculation or computation of compensation in money can be made.

* * * * *

"XI. That under the oral agreement aforesaid, between Albie C. Sansbury and the plaintiff, establishing the relationship of natural parent and child between them and in pursuance thereto and in fulfillment thereof, plaintiff made her home with Albie C. Sansbury until plaintiff's marriage, and conducted herself towards him as a dutiful daughter and helped him with his work and personally served and cared for him and devoted herself to serve him as he required and treated him as a father and permitted him to enjoy her companionship and society incident to such relation, and a strong affection grew between them that became deep and abiding, and their association of parent and child persisted until the death of Albie C. Sansbury.

* * * * *

"XXI. That plaintiff has no adequate remedy at law. That the work and services rendered by the plain-

tiff to and for Albie C. Sansbury were not those performed by an employee to an employer, but were of a domestic nature and character that included personal attention, intimate relation, companionship and society prevalent only among members of a family, living together in one household, for the measure of the value thereof there exists no pecuniary standard. That the plaintiff cannot be adequately compensated in damages.

"XXII. That Albie C. Sansbury, deceased, entered into and became bound by said agreement, which established the relation of natural parent and child between him and the plaintiff, by which he was obligated to give and leave at his death to this plaintiff, upon the performance by plaintiff of her part of said agreement, a one-quarter (¼) interest, a child's proportionate interest, in all the property, real and personal, of which he might die seized and possessed. That plaintiff has fully performed her part of said agreement so made, and is entitled to a one-quarter (¼) interest, a child's proportionate interest, in the property, real and personal, of which Albie C. Sansbury died seized and possessed.

* * * * *

"CONCLUSIONS OF LAW

I.

"It is adjudged and decreed that plaintiff be and she hereby is entitled to specific performance of her contract.

II.

"It is adjudged and decreed that plaintiff be and she hereby is the owner of a one-quarter (¼) interest, a child's proportionate interest, in all the property, real and personal, of which Albie C. Sansbury died seized and possessed, subject only to a one-quarter (¼) share in the funeral expenses and debts and of the expense of an impartial administration, including reasonable and just compensation for the administrator and reasonable and just fees for administrator's attorney for an impartial administration of the estate of Albie C. Sansbury, deceased.

III.

"It is adjudged and decreed that Margueriette H. DeKarlo have no right, title, interest, estate, claim or lien in and upon the property, real and personal, of which Albie C. Sansbury died seized and possessed, except as respects a one-quarter (¼) interest, a child's proportionate interest, therein, subject to a one-quarter (¼) share in the funeral expenses and debts and of the expense of an impartial administration, including reasonable and just compensation for the administrator and reasonable and just fees for administrator's attorney for an impartial administration of the estate of Albie C. Sansbury, deceased.

* * * * *

"MEMORANDUM

"Our State reports, as well as reports of other jurisdictions, are well sprinkled with cases involving specific performance of oral contracts, having to do with property and rights in property of decedents. Many cases cover situations somewhat similar to the general conditions here existing, but very seldom do we find two cases based on exactly similar situations, like conditions.

"The picture here displayed can well be visualized—along the first decade of this century the plaintiff's mother, no doubt a woman of some ability and of good appearance, twice married, twice divorced, given custody of her three minor children by the divorce courts, arrived in St. Paul, where she had at least two admirers. She has the good welfare of her children at heart. On her third matrimonial venture, she wants her three children to continue to have her care and attention, as well as the care and love of a father. She hopes that her third husband will agree to a father's responsibility as to her children and assume a father's place in their lives. And Albie agrees, in fact urges himself into the family, in full agreement that her wishes are his, and that he will fulfill his duty as father to the three. At the time of marriage he was, in 1907, a soldier at Fort Snelling,

at a soldier's rather meager pay. After his marriage to Alice, he develops, he takes heart, and earnestly and honestly enters into other active physical work, in which he grows and grows all the time during said marriage, helped also by some additional income from Alice's forbears. He makes money, saves money, accumulating a fairly nice estate with the help of his wife and his children. She died in 1947. In 1948 he died.

"The depressing part of this suit is that along in 1915 Albie forgot his own marriage vows to Alice, taken in 1907, and becomes intimate with another woman, and she has a child—his child with another woman—born August 28, 1916. Albie's wife, Alice, forgives him, takes his child at her age of five months into her home, and in October, 1923, she joins her husband in adopting his child into her own home, to be cared for and mothered by her, Alice, in the same way that she and Albie had agreed to get married on condition that he take on her three legitimate children and be a father to them.

"Instead of three children, she then had four. Albie, instead of three, whom he agreed to father, had also four. There is no question but what Albie and Alice's three children, from August, 1907, the date of marriage, lived as a happy, contented family, each doing his or her share—father and mother and three children. And there is no question but what Albie and Alice, after the adoption of Margueriette, continued to live a happy life, each helping fully. With Margueriette's advent into the family, Alice and Albie continued to do well. And the intent of all was that Albie and Alice had four heirs. Equity, backed by sufficient evidence, calls on me to so decide the case that each child will have one-fourth of the estate left by Albie and Alice.

"As before stated, no two cases are just the same. 'The great underlying purpose of the Court is to do justice. In many types of cases a rule which will do justice in every case cannot be laid down in advance. It is wisdom to refrain from making a hard and fast rule, since it might hinder the doing of justice in some instances.'

"See: Winne v. Winne, et al (N. Y.), 59 N. E. Rep. 832 (Mar. 12, 1901), a leading case.

"Dated this 25th day of February, 1950.

ALBERT H. ENERSEN,
a District Judge of the Ninth Judicial District (of Marshall, Minn.), sitting for and at the request of the Judges of this District.

"The undersigned presided at the trial of the above cause, and made findings of fact, conclusions of law, and order for judgment therein, on February 25, 1950, which was filed on the 27th day of February, 1950, and attached thereto was a memorandum, made and filed the same date, which memorandum is hereby ordered to be made a part of the aforesaid decision which, through inadvertence, was omitted and it was the intention of the Court to have made said memorandum a part of the decision, in the first instance.

"Dated March 24, 1950.

"By the Court,

ALBERT H. ENERSEN,
Judge."

(R. p. 51-52.)

STATEMENT OF FACTS DISCLOSED BY THE RECORD

The facts and circumstances found in the record are as follows: Prior to the marriage of Albie C. Sansbury to the mother of the three petitioners, they resided in St. Paul, Minnesota. Mrs. Leah Rempher, sister of the mother of the respondents, made them a visit in St. Paul in 1905, and she testified to the fact that a Mr. Hart thought so favorably of her sister that he wanted to marry her and would consider her children as if they were his own; but the mother of petitioners also knew a soldier in U. S. Army stationed at Fort Snelling, Minnesota, Mr. Albie C. Sansbury, who also thought so favorably of the mother of petitioners that he also wanted to marry her. Under this situation Mrs. Rempher was taken to Fort Snelling by her sister to meet this soldier, and, on

their return stated to her sister, Mrs. Rempher, that if Mr. Sansbury would agree to consider her children as his own and become a natural parent to them, she would marry him in preference to Mr. Hart. The next time Mrs. Rempher visited her sister, the mother of petitioners, in 1907, she lived in Minneapolis when she married Albie C. Sansbury; and, on this visit the contract in question in this case was entered into in the presence of Mrs. Rempher, as her testimony discloses. After said marriage, daughter Muriel lived and worked at home and when she worked outside, brought her earnings home, all to sustain and maintain that family relationship embodied in the oral contract aforesaid. She continued to render domestic service and furnish companionship and society of that of a child to a parent, until she married, when she moved to Wisconsin. The relationship that existed between children and parents in the Sansbury home is disclosed by the testimony of five witnesses who were intimately associated with the Sansbury family at the time and up to the marriage of Muriel who then had completed her contract. Her marriage, however, did not end the relationship of parent and child with her parents; and the relationship remained unto the very time of death of Mr. Sansbury as the evidence discloses. Ray Franklin Bushaw fulfilled the relationship of son and parent from the date of the aforesaid contract until he married when he was twenty-two years old.

Ray, like Muriel, until he married, performed all kinds of domestic duties and when working out contributed his earnings to the family and afforded society and companionship of that of a son to Mr. Sansbury. Marvel Sansbury, when 16 years old, about 1921, was adjudged incompetent and was confined for six years, and except for this time, she rendered services continuously in the Sansbury family such as wash-

ing, cleaning house, cooking and caring for the garden. She took Mr. Sansbury's name; although handicapped she added her bit to maintain the Sansbury family relationship. The acts, behavior and language and consideration of these three petitioners for Mr. Albie C. Sansbury and his reciprocity thereto, the evidence discloses, could have been no more intimate, filial, obedient, companionable and affectionate, than if their relation had been that of blood of parent and children. The last birthday of Albie C. Sansbury, his wife having predeceased him, was celebrated at his home on 80th and Lyndale Avenue North by all the members of the Sansbury family, including the third generation. The close association of Albie C. Sansbury with the three petitioners is one continous unbroken story by respect, deep consideration, affection and that intimate society relationship existing in families which the evidence discloses existed to the very last day of his life. The evidence of the life of this family since 1907 up to the death of Mr. Sansbury depicts a relationship which is the very warp and woof of society making family life the unit in our democratic form of society without which it could not be maintained.

Respondents claimed that Marvel did not fall within the terms of the contract. After her mother's death respondents' witness, Mrs. Ferragin, testified that Mr. Albie C. Sansbury paid her for Marvel's keep. Also, petitioners McCarty testified that after their mother's death, Mr. Albie C. Sansbury paid for Marvel's keep at the Hopkins Home. Mr. Sansbury was only complying with his contract made in 1907 with her mother. Petitioners had fulfilled their part of their agreements with Albie C. Sansbury, but he failed to carry out his part with them and died intestate.

In this case in the court below the one question of whether an agreement as claimed by respondents was made, was sub-

mitted to a jury for a special verdict and the jury found in the affirmative. The Court adopted the verdict of the jury, and made findings and conclusion that petitioners had specifically performed their contracts with the decedent, Albie C. Sansbury, who had failed to perform his part thereof; and thereupon ordered specific performance thereof decreeing a child's interest, namely, a quarter interest of the decedent's estate to each of the petitioners. It is submitted that the evidence justified the verdict of the jury and justified the adoption of said verdict by the trial court and the making of the findings of fact and conclusions of law of the trial court as found in the record and the judgment entered thereon from which respondents appealed and secured a reversal of the three judgments.

There was no federal question in this case until it was first made in petitioners' petition for re-argument. The petitioners obtained a favorable special verdict of the jury, also obtained favorable findings of fact and conclusions of law in the trial court upon which judgments were entered in favor of petitioners, no motion having been made theretofore on account of any error in the trial proceedings. Defendants-respondents appealed from said judgments and secured a reversal of them. Thereafter petitioners made a petition for re-argument wherein was drawn in question the 14th Amendment of the Federal Constitution and setting forth that the petitioners had been denied due process of law and equal protection of laws in the decision of the Supreme Court of Minnesota in that it deprived petitioners of rights, liberty and property guaranteed them by the aforesaid 14th Amendment, which claim was set out in petitioners' petition for re-argument in the following language:

> "Respondents claim that the decision of this honorable court rendered March 16, 1951, reversing the final judgments of the trial court rendered in favor of re-

spondents nullified and held for naught the rights of the respondents under their contracts judicially established in the lower court which resulted in an abridgement of their rights and immunities as citizens of the United States and of the State of Minnesota in contravention of Section 1, Article 14, of the Amendments of the United States Constitution, and the decision of this honorable Court under said Amendment deprived respondents of their liberty and their property without due process of law and denied to each of them within its jurisdiction the equal protection of the law."

JURISDICTION OF THIS COURT

The jurisdiction of this Court to review by writ of certiorari judgments of the highest state court is determined and based upon 28 *U. S. C.*, Section 1257 (3), providing that it shall be competent for this Court by certiorari to require that there be certified to it for review and determination with the same power and authority and with like effect as if brought by writ of error, any cause wherein a final judgment or decree has been rendered by the highest court of a State in which a decision could be had on any title, right, privilege, or immunity, especially set up or claimed by either party under the Constitution, or any treaty or statute, or commission held or authority exercised in the United States.

It was under this federal claim of rights by petitioners in various divisions of their petition, wherein it is claimed that the Minnesota Supreme Court, in making its decision, weighed the evidence and determined the credibility of witnesses and usurped the function of the trier of facts.

That some conclusions in the opinion of the highest state court are without factual bases in the evidence, and as an instance thereof that the principal testimony of Mrs. Leah Rempher concerning the statement made by Albie C. Sansbury about his agreement with petitioners' mother to make

petitioners his children and treat them as a father would, was not made in the presence of the petitioners and confusingly joined this statement with that made by Mr. Albie C. Sansbury to witness Carl Otto Frenzel in a conversation that took place many years after the agreement in question had been made and was in Mr. Sansbury's home, where Mr. Frenzel was visiting him and remained over night, and there were no other persons present.

In *Carlson vs. Curtiss,* 234 U. S. 103, at pages 105-106, the Court said:

> "* * * Our examination of the Federal question is somewhat embarrassed because the findings and statements of fact by the state courts contain no finding respecting some of the facts that are alleged as the basis of the present contention of plaintiff in error.
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> * * * * * *
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> "* * * While in ordinary cases we are bound by the findings of the state court of last resort respecting matters of fact, it is hardly necessary to say that that court cannot, by omitting to pass upon the basic questions of fact, deprive a litigant of the benefit of a Federal right, any more than it could do so by making findings that were wholly without support in the evidence. And just as this court, where its appellate jurisdiction is properly invoked and all the evidence is brought before it, will, if necessary for a decision of a Federal question, examine the entire record in order to determine whether there is evidence to support the findings of the state court, so it is our duty, in the absence of adequate findings, to examine the evidence in order to determine what facts might reasonably be found therefrom and which would furnish a basis for the asserted Federal right. *Southern Pacific Co. vs. Schuyler,* 227 U. S. 601, 611, and cases cited."

That a higher degree of proof was asserted to govern the testimony of petitioners' witnesses than that enunciated by the trial judge in his instructions to the jury and that required by law.

The three decisions, namely, *Brasch vs. Reeves,* 124 Minn. 114, 144 N. W. 744; *Hanfield v. Fairbrother,* 191 Minn. 547, 254 N. W. 821, and *Greenfield vs. Peterson,* 141 Minn. 475, 170 N. W. 496, cited by the Minnesota Supreme Court as a basis for overruling and reversing the judgment of the trial court, it is submitted, fail to support respondents' contention for said cases, they being the principal ones cited in their brief, but sustain the decisions of the trial court.

That the Minnesota Supreme Court decision overrules a long line of decisions in Minnesota commencing with *Swanburg vs. Foseen,* 75 Minn. 350, 73 N. W. 4, wherein the three nieces were taken into a home of their uncle under a verbal agreement that they were to be treated as his children and who thereafter shared in his estate down to the present in similar cases cited in respondents' brief.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

Petitioners' actions were instituted to enforce an oral contract whereby they became children of decedent Albie C. Sansbury and he their parent to obtain for each a child's share in his estate, and to bring the same out of the Statute of Frauds, partial or full performance of said contract must be proved. The decision of the highest state court of Minnesota wholly failed to recognize the complete performance of petitioners' part of this oral agreement; and it was only by the consideration by the triers of facts of the life of Albie C. Sansbury and the life of the three petitioners living together in one household in the relationship of parent and children that enabled them to believe and find and render their special verdict that such an agreement was made.

In *Files vs. Brown,* 124 Fed. Rep. 133, at page 136, the Court stated:

> "* * * The difference between actions at law and suits in equity is a matter of substance, not of form. It

inheres in the natures of the causes of action, in the principles which control and in the remedies which follow them, and it cannot be eradicated either by a change of form or by the abolition of forms. A legal cause of action cannot be maintained in equity, because there is an adequate remedy for it at law, and it is only where there is no such remedy that relief in equity may be successfully sought. Equitable causes of action are not available at law, because they invoke the judgment and appeal to the conscience of the chancellor, and the free exercise of that judgment and conscience is prohibited in actions at law by the rule which entitles every party to a trial of all the issues of fact by a jury."

Minnesota Statutes 1949, Chapter 513:

"513.01. *No Action on Agreement, When.* No action shall be maintained, in either of the following cases, upon any agreement, unless such agreement, or some note of memorandum thereof, expressing the consideration, is in writing, and subscribed by the party charged therewith:

(1) Every agreement that by its terms is not to be performed within one year from the making thereof;

(2) Every special promise to answer for the debt, default or doings of another;

(3) Every agreement, promise, or undertaking made upon consideration of marriage, except mutual promises to marry;

(4) Every agreement, promise or undertaking to pay a debt which has been discharged by bankruptcy or insolvency proceedings. [R. L. s. 3483] (8456)"

"513.06. *Specific Performance.* Nothing in this chapter contained shall abridge the power of courts of equity to compel the specific performance of agreements in cases of part performance thereof. [R. L. s. 3489] (8461)"

The highest state court of Minnesota wholly ignored the last paragraph of paragraph IV of the Court's Findings of Fact, namely:

"That in fact in arranging for and consummating this marriage with the plaintiff's mother, the said Albie C.

> Sansbury, as a part consideration for said marriage, agreed to take Alice's three children as his own children and treat them as their natural father; that the said Alice's three children would be his heirs at law; that from the time of the marriage the relationship of father and child would exist between him and each of said Alice's three children, including the plaintiff herein." (R. p. 40.)

The highest state court of Minnesota ignored the trial court's Finding of Fact No. XV, as well as the trial court's Memorandum made a part of the Court's decision, concerning the four children of Albie C. Sansbury and Alice Ames Sansbury, and the division of the estate equally among them.

In *Creswill v. Knights of Pythias*, 225 U. S. 246, at page 261, the Court said:

> "* * * While it is true that upon a writ of error to a state court we do not review findings of fact, nevertheless two propositions are as well settled as the rule itself, as follows: (a) that where a Federal right has been denied as the result of a finding of fact which it is contended there was no evidence whatever to support and the evidence is in the record the resulting question of law is open for decision; and (b) that where a conclusion of law as to a Federal right and finding of fact are so intermingled as to cause it to be essentially necessary for the purpose of passing upon the Federal question to analyze and dissect the facts, to the extent necessary to do so the power exists as a necessary incident to a decision upon the claim of denial of the Federal right. *Kansas City So. Ry. Co. vs. Albers Comm. Co.*, 223 U. S. 573, 591; *Cedar Rapids Gas Co. vs. Cedar Rapids*, Ib. 655, 668; *State of Washington ex rel. vs. Fairchild*, 224 U. S. 510."

There is an obscurity and confusion that permeates the decision of the highest state court of Minnesota in reference to facts, law and rules of equity governing.

In *Minnesota vs. National Tea Co., et al*, 309 U. S. Rep. 551, at pages 555 and 557, the Court said:

"* * * This Court has frequently held that in the exercise of its appellate jurisdiction it has the power not only to correct errors of law in the judgment under review but also to make such disposition of the case as justice requires. * * *

"* * * But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action. Intelligent exercise of our appellate powers compels us to ask for the elimination of the obscurities and ambiguities from the opinions in such cases. * * *"

Evelyn Martha McCarty, daughter-in-law of petitioner McCarty, testified to the fact that she was introduced by her husband to Albie C. Sansbury, as her husband's grand-dad.

Florence Sarah Stasel, Sylvia June Derby Peterson, Mrs. Richard Wagner, Charles W. Derby, and Elmer Oscar Almquist, all witnesses for petitioners, all of whom lived as neighbors of Albie C. Sansbury and family for a period of about three years from 1908 to 1912, all testified to the relationship of Albie C. Sansbury to the petitioners as that of parent and children, the petitioners addressing Albie C. Sansbury as "Pa" and their mother as "Ma," and that they lived together as a happy family, as each observed of their conduct among each other and their language to each other.

In *Jones National Bank vs. Yates*, 240 U. S. 541, at page 563, the Court said:

"* * * The questions of fact, so far as they arose upon a substantial conflict in evidence, were for the trial court. *Citizens Ins. Co. vs. Herpolsheimer, supra; Madison Bank vs. Gross, supra.* It is not necessary for us to review the evidence in detail. It is sufficient to say that our examination of it has convinced us that the findings of the trial court, at least with respect to the last mentioned reports, had substantial support; and, in this view, we must conclude that the reversal of the judgments, as entered in the trial court, upon the ground of

the legal insufficiency of the plaintiffs' case when tested by the Federal statute, was error."

It stands admitted that an appellate court has a right to go into an examination of the evidence presented in the trial court to ascertain the sufficiency thereof to support the decision in said court; but such examination goes only so far as ascertained if there is a conflict in the testimony, or if there is substantial evidence to support the decision, and if a jury has sat in the case and rendered a verdict on which the decision is made, and when that is found the decision is affirmed. *Fred Blume vs. Gust Ballis, et al,* 207 Minn. 393, 291 N. W. 906; *State ex rel. Northern Pump Co., Relator, vs. So-called Village of Fridley, et al,* decided March 30, 1951, while petitioners' case was pending and before final decision thereof was made by denying petitioners' petition for reargument May 17, 1951.

In *Truax, et al, vs. Corrigan,* 257 U. S. Rep. 312, the Court said at pages 324-325:

> "* * * In cases brought to this court from state courts for review, on the ground that a federal right set up in the state court has been wrongly denied, and in which the state court has put its decision on a finding that the asserted federal right has no basis in point of fact or has been waived or lost, this court as an incident of its power to determine whether a federal right has been wrongly denied, may go behind the finding to see whether it is without substantial support. If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here. *Kansas City Southern Ry. Co. vs. Albers Commission Co.,* 223 U. S. 573, 591, 593; *Cedar Rapids Gas Light Co. vs. Cedar Rapids,* 223 U. S. 655, 668, 669; *Southern Pacific Co. vs. Schuyler,* 227 U. S. 601, 611. Another class of cases in which this court will review the finding of the court as to the facts is when the conclusion of law and findings of fact are so intermingled as to make it necessary, in order to pass upon the question, to analyze

the facts. *Northern Pacific Ry. Co. vs. North Dakota*, 236 U. S. 585, 593; *Jones National Bank vs. Yates*, 240 U. S. 541, 552, 553."

And at pages 332-333:

"* * * Our whole system of law is predicated on the general, fundamental principle of equality of application of the law. 'All men are equal before the law,' 'This is a government of laws and not of men,' 'No man is above the law,' are all maxims showing the spirit in which legislatures, executives and courts are expected to make, execute and apply laws. But the framers and adopters of this Amendment were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public opinion. They, therefore, embodied that spirit in a specific guaranty.

"The guaranty was aimed at undue favor and individual or class privilege, on the one hand, and a hostile discrimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process."

QUESTIONS PRESENTED

The questions presented by petitioners' petition herein for a Writ of Certiorari are:

1. Whether the actions herein by petitioners against R. R. Nelson, Administrator of the Estate of Albie C. Sansbury, and Margueriette H. DeKarlo, wherein it is alleged that the decedent Albie C. Sansbury entered into an oral agreement at or about the time of his marriage, October 20, 1907, to a widow, Alice A. Hierlmier, and her three children, the petitioners, and in consideration of said marriage, to their mother, agreed to make them his own children and become a natural father to them and on the further consideration of the services, society and filial affection of said children to their said father, there was sufficient evidence given in the trial of said actions for specific performance of said oral agree-

ment to secure a child's interest in the estate of Albie C. Sansbury, warranting a favorable special jury verdict and favorable findings of fact, conclusions of law and memorandum made a part of the decision by the trier of facts, upon which judgments were entered.

2. Whether the testimony of witness, Leah Rempher, concerning the language used in the making of the verbal agreement herein in question between Albie C. Sansbury on one side, and Alice Ames Sansbury, and petitioners, on the other side; and the circumstances of the presence of petitioners when said agreement was made disqualified them as witnesses in the proof of the agreement in which they were interested and were permitted to testify that they were present at the aforesaid conversation and heard what was said, which was thereafter repeated to them; and the testimony of witness Charles W. Derby, who testified to the fact that when the Sansbury family moved into the neighborhood where he was living in 1909, he was introduced to Ray and Muriel by Albie C. Sansbury as his son and daughter; and the testimony of the witness, Carl Otto Frenzel, a friend of Albie C. Sansbury, who visited Albie C. Sansbury at his home, where he remained over night in 1933 when Mr. Sansbury in his conversation about his family admitted responsibility for the three petitioners, and stated that he would take care of the petitioners as well as Margueriette since he could not take anything with him; and the testimony of witnesses Almquist, Peterson, Wagner and Stasel, all living as neighbors of the Sansbury family, visiting frequently, testified to the fact that in the conversations between the children, petitioners, and Mr. Sansbury, they addressed him as "Pa," and from the conduct of the family observed, and the language heard used between them, disclosed a happy family relationship; and the testimony of Ferne and George Organ and Evelyn McCarty, and Norman Nelson, members of the

third generation of the McCarty family, and grandchildren of Albie C. Sansbury, all of whom testified to the fact that each one addressed him as "grandpa" and "granddad"; all of above testimony was sufficient evidence in support of the family relationship between petitioners and Albie C. Sansbury of natural children and natural father which relationship grew out of the agreement entered into at the time of the marriage of their mother to Albie C. Sansbury.

3. Whether in view of all the testimony not only given by the aforesaid mentioned witnesses but all the testimony of the defendants' witnesses, upon which the weight of evidence was resolved in favor of petitioners, by the rendition of a favorable special verdict and by the making of favorable findings of fact, conclusions of law, and memorandum made part of the decision by the trial court decreeing a child's share, a one-fourth interest in the estate of Albie C. Sansbury; and, decreeing a child's share and a one-fourth interest to defendant, Margueriette H. DeKarlo. There being no motion for amended findings or for a new trial on account of any error occurring during the said trial, judgments were entered, wherefrom defendants appealed to the Supreme Court of Minnesota and secured a reversal of said judgments, the decision being made and filed March 16, 1951. Petitioners thereupon timely made a petition to the highest court of the State of Minnesota, the Supreme Court, for re-argument and re-hearing of aforesaid decision, setting up a federal question, namely, that the decision so made by the highest state court reversing the judgments of the trial court, was violative of the Fourteen Amendment of the Constitution of the United States in that it deprived petitioners of their rights, liberties and property in violation of the due process of law clause and the equal protection of law clause of the aforesaid Fourteenth Amendment. Petitioners' petition for re-argument was denied May 17, 1951, making the judgment

of the highest state court final, whereupon this petition for writ of certiorari is based. Petitioners believe they are entitled to the issuance by this Court to its writ of certiorari herein.

SPECIFICATION OF ERROR TO BE URGED

The Supreme Court of Minnesota, in its opinion in said causes, erred:

1. In holding and deciding that the evidence adduced at the trial of the causes below did not suffice to sustain a special verdict of the jury and the findings of fact and conclusions of law and memorandum made a part of the decision, and that therefore petitioners as a matter of law and equity were not each entitled to a child's share in the estate of Albie C. Sansbury.

2. In holding and deciding that the evidence which was adduced at the trial was insufficient to support the judgment of the trial court.

3. In holding and deciding that the special verdict of the jury was of no significance in these cases.

4. In holding and deciding in effect that under the evidence adduced each petitioner had no case.

5. In reversing the judgments obtained by petitioners in the trial court.

6. In denying petitioners' petition for re-argument and re-hearing wherein was set out and claimed that the decision of the highest state court was violative of the Fourteenth Amendment of the United States Constitution in that it deprived petitioners of their rights, liberties, and property without due process of law and without equal protection of the law guaranteed to them by the aforesaid Fourteenth Amendment of the United States Constitution.

PRAYER OF PETITIONERS

Wherefore, petitioners pray that Writ of Certiorari be issued by this Court directed to the Supreme Court of Minnesota to the end that the decision and judgment of said Supreme Court of Minnesota in causes entitled

Muriel F. McCarty, Plaintiff and Respondent, vs. R. R. Nelson, Administrator of the Estate of Albie C. Sansbury and Margueriette H. DeKarlo, Defendants-Appellants,

and

Ray Franklin Bushaw, Plaintiff and Respondent, vs. R. R. Nelson, Administrator of the Estate of Albie C. Sansbury, and Margueriette H. DeKarlo, Defendants-Appellants,

and

Marvel Sansbury, by Muriel F. McCarty, guardian ad litem, Plaintiff and Respondent, vs. R. R. Nelson, Administrator of the Estate of Albie C. Sansbury and Margueriette H. DeKarlo, Defendants-Appellants.

one appeal having been taken covering the three above named cases, bearing No. 35287, be reviewed by this Court as provided by law and that upon such review said decision and judgment be reversed, and that petitioners have such other relief as to this Court may seem appropriate.

Dated October 12, 1951.

MURIEL F. MCCARTY,
RAY FRANKLIN BUSHAW and
MARVEL SANSBURY,
by her Guardian ad Litem,
Petitioners.

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